

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

July 28, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2005-111-M
Petitioner	:	A.C. No. 07-00093-54165
	:	
v.	:	
	:	
PENNSY SUPPLY, INC.,	:	Tarburton Pit
Respondent	:	

DECISION

Appearances: Keith E. Bell, Esq., U.S. Department of Labor, Arlington, Virginia; Brian Y. Yesko, Conference and Litigation Representative, Warrendale, Pennsylvania, on behalf of the Petitioner; Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, on behalf of the Respondent.

Before: Judge Bulluck

This case is before me upon Petition for Assessment of Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration ("MSHA"), against Pennsy Supply, Incorporated ("Pennsy"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d). The Secretary seeks civil penalties in the amount of \$406.00 for two alleged violations of her safety regulation found at 30 C.F.R. § 56.11001.

A hearing was held in Dover, Delaware. The parties' Post-hearing Briefs and Reply Briefs are of record. For the reasons that follow, the citations shall be vacated.

I. Stipulations

The parties stipulated as follows:

1. Pennsy Supply is owned and operated by Pennsy Supply, Incorporated;
2. Pennsy Supply, Incorporated, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;
3. The presiding Administrative Law Judge has jurisdiction over these proceedings;

4. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date, time, and place stated thereon, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein;

5. The parties stipulate to the authenticity of their exhibits, but not to their relevance or the truth of the matters asserted therein;

6. The total annual hours worked at Pennsy Supply, Incorporated, is approximately 24,437 hours per year;

7. The computer printout reflecting the Respondent's history of violations is an authentic copy, and may be admitted as a business record of the Mine Safety and Health Administration; and

8. The imposition of the proposed civil penalties will not affect the Respondent Pennsy Supply's ability to remain in business.

II. Factual Background

Pennsy is a division of Old Castle Materials Group. Tr. 89. On January 11, 2005, MSHA Inspector Reece Horn conducted his first inspection of Pennsy's Tarburton Pit, a seasonal sand and gravel operation in Dover, Delaware, employing 15 to 18 employees. Tr. 42, 110-11. The plant was shut down for winter maintenance on the day of the inspection, and Tarburton's plant manager, Richard Hickman, and its safety director, Dorothy Lehmann, were on site. Tr. 12, 36, 157-58. When Horn commenced his inspection, he observed that the C2 stacker conveyor and the C1 conveyor, situated above and feeding the stacker, did not have walkways or extended fittings.¹ Tr. 10, 16, 24-26. No work was being performed on the equipment at the time of Horn's inspection. Tr. 36. Based on his observations, Horn asked plant operator Thomas Avery, who was performing maintenance duties nearby, how he greased the head pulleys of both conveyors. Tr. 12, 26, 161-62. Avery told Horn that he greased them on average of every two weeks. Tr. 10, 17, 29. He further stated that he climbed up the lattice-work on the side of the C2 stacker conveyor and walked the belt to the head pulley. Tr. 10, 12, 17. As for the C1 conveyor, Avery told Horn that he used a ladder to access it, then walked down the belt to grease the head pulley. Tr. 24-29. Lehmann and Hickman were nearby during this discussion, but only Lehman heard Horn question Avery. Tr. 22, 163-64, 201. Horn then discussed Avery's statement with Hickman, and was told that Hickman had no knowledge of Avery walking the belt to service the head pulleys. Tr. 22-23. Horn estimated the distance down the C2 stacker belt, from the alleged point of access to the head pulley, to be 150 feet. Tr. 17-18. The point of access on the C1 belt

¹Extended fittings are used to grease machine parts, like head pulleys, from remote locations.

to the head pulley, as indicated to Horn by Avery, is approximately 20 feet. Tr. 26-27, 29-31. Both belt structures are curved surfaces. Tr. 18, 20, 30. Horn and Avery estimated that the C2 stacker conveyor, in its lowered position, is ten feet above ground. Tr. 17; ex G-2. Horn approximated the distance from the C1 head pulley to the ground at 15 to 20 feet. Tr. 29, 62-63. As a result of his observations and discussions with Avery and management, Horn issued two citations alleging significant and substantial violations of 30 C.F.R. § 56.11001. Citation No. 6020987 describes the hazardous condition as follows:

Safe access was not provided to the C2 stacker conveyor belt's head pulley to grease the bearings. A person was climbing the belt structure 67 inches onto the belt and walking the belt approximately 150 feet to the head pulley. From the head pulley to the ground [is] estimated to be 10 feet when the conveyor was lowered. The head pulley bearings are greased once every two weeks. A slip and fall hazard existed to the person greasing these bearings.

Ex. G-1. Citation No. 6020988 alleges the following:

Safe access was not provided to grease the head pulley bearings for the C1 conveyor. A person was climbing a ladder getting onto the belt and walking the belt approximately 20 feet to the head pulley, the left side of the head pulley to the metal guard for the C2 conveyor belt [sic] tail pulley measures 9 feet, from the tail pulley guard to the ground measured 4 feet. The right side of the head pulley [is] estimated to be 9 feet to the C2 conveyor. The head pulley bearings are greased every two weeks. A slip and fall hazard existed to person greasing these head pulley bearings.

Ex. G-3.² Pennsy timely abated the citations by installing extended grease fittings. Tr. 113; ex. G-4. No additional citations were issued to Pennsy as a result of this inspection and, of the five or six other conveyors that were inspected, all had walkways or accessible fittings. Tr. 16, 20-21.

Pennsy conducted its own investigation of the procedures being utilized by the entire crew to service the head pulleys on the C1 and C2 conveyors and, having uncovered no evidence of unsafe practices other than Avery's statement to Horn, issued Avery a letter of warning. Tr. 165-66, 194-95, 211-13; ex. R-9.

²Pennsy's protest that the violations were based on Avery's statement, rather than Horn's observation, resulted in MSHA modifying the Condition or Practice section of both citations by adding the following language: "Information for this violation was obtain [sic] from employees [sic] at the plant. The company stated they were not aware of this practice." Ex. G-1, G-3.

III. Findings of Fact and Conclusions of Law

A. Applicable Case Law

30 C.F.R. § 56.11001 provides that “[s]afe means of access shall be provided and maintained to all working places. The Commission has held that section 56.11001 embodies the dual requirement of providing and maintaining safe access to working places. *Watkins Engineers & Constructors*, 24 FMSHRC 669, 680 (July 2002). A violation may be found when either or both prongs of the standard are not met. An operator’s duty to “provide” a safe means of access incorporates the responsibility to instruct its employees on the procedure for safe access. *Id.* at 681. By interpreting “maintain” according to its plain meaning, the Commission has concluded that the term “requires an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place.” *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 (July 2001); *Western Industrial, Inc.*, 25 FMSHRC 449, 452 (August 2003). The Commission has further explained that the duty to maintain safe access requires constant vigilance because it “incorporates an on-going responsibility on the part of the operator to ensure that a means of safe access is utilized, as opposed to a purely passive approach in which the operator initially provides safe access and then has absolutely no further obligation.” 24 FMSHRC at 680 (quoting *Lopke*, 23 FMSHRC at 708). More is required than simply making a safe means of access “available,” since the Commission has held that, “at a minimum, the standard’s requirement that operators ‘maintain’ safe access to working places mandates that management officials utilize that access, and require other miners to do so.” 23 FMSHRC at 709.

B. The Testimony

1. The Secretary’s Witness

MSHA Inspector Reece Horn testified that he questioned plant operator Thomas Avery about his method of greasing because “he couldn’t get to the head pulley [safely]” without a walkway or extended fitting. Tr. 10, 12-13. Horn elaborated on his concerns about accessing both conveyors, by explaining that the belts are curved, wet when the plant is operating, have no safe place to tie off, and would require bending over them to service the head pulleys. Tr. 18-19, 30. These conditions, he asserted, caused a slip and fall hazard that could result in serious injuries ranging from cuts and bruises, broken bones and head injuries, to a fatality. Tr. 30-31. Horn testified that when he discussed Avery’s statements with plant manager Hickman, he stated that he “had no idea that the employee was climbing the belt and walking the belt line, that there was a man lift provided at the other site, but not that was there that day.” Tr. 32-34; see 23, 47-48, 51. Horn acknowledged, in fact, that no one in mine management had seen or had knowledge of any employee walking the belt to grease the head pulleys. Tr. 66, 68-69. In his opinion, in order to prevent this hazardous condition, a reasonable, prudent operator would “[keep] a walkway, ladders, and fall protection, make sure his people were using it, check on his people to make sure they were using the access that was provided, the fall protection and stuff they were supposed to be using, that they thought they were using.” Tr. 34-35; see 23, 67. He also acknowledged, through somewhat inconsistent testimony, that multiple ladders, safety harnesses, belts and lines were on site, accessible, and in good condition. Tr. 31, 49-51, 55, 66;

see 14;

ex. R-1. Finally, according to Horn, his review of Pennsy's training records indicated that the company had been providing training to its employees on fall protection, and that Avery had received his annual refresher training. Tr. 52.

2. Pennsy's Witnesses

Robert Dailey, vice-president of occupational health, safety and environment, has been with Pennsy since February 2004 and has responsibility for Pennsylvania, New Jersey and Delaware operations. Tr. 89. Dailey testified that he is responsible for implementing safe work practices, as set forth in Pennsy's Employee Safety Manual, for all of its mining operations, as well as revising the company's policies. Tr. 91-92; ex. R-3. He summarized Pennsy's Fall Protection Program as "designed as a safeguard in the event alternate means of safe access cannot be provided. It outlines the requirements and responsibilities of employees to make a safe assessment. It also requires that whenever an employee has to work at a height we've chosen greater than six feet or greater, that they would be required to utilize some form of fall protection means." Tr. 92-93; ex. R-3, sec. 3.1. Dailey pointed out that employees are required to immediately report to their supervisors all questionable or dangerous conditions. Tr. 93-94. He asserted that the company strictly enforces its safety rules, and that employees have faced discipline as severe as termination for failure to follow safe work practices. Tr. 94, 101. In Dailey's opinion, the C1 and C2 conveyors, at the time of inspection, provided adequate means of tying off with use of short lanyards. Tr. 95. He noted that, as part of Pennsy's ladder safety program, the company had recently converted to fiberglass ladders only, and that use of secured ladders to grease pulleys is an acceptable means of safe access used worldwide. Tr. 96-97. He noted that Pennsy's annual refresher training specifically includes use of ladders, safe access, conveyor safety, and fall protection. Tr. 97. Respecting avoidance of injury during plant maintenance, he asserted, the safety manual clearly prohibits climbing on conveyors in a quarry, with the exception that "conveyors may be used as access during maintenance only when proper lockout, tag out and fallout procedures have been implemented. . . . And in addition, that fall protection or harness and lanyard is required where there is a danger of falling during maintenance." Tr. 97-98, 127. He explained that at lower heights, a smaller work platform or ladder would be preferable. Tr. 99. Dailey identified hazard recognition and selection of appropriate equipment as topics covered in Avery's Part 46 annual refresher training, which encompassed safe access and maintenance issues. Tr. 102-107; ex. R-5. According to Dailey, he visits Tarburton Pit every few months, and has not found the plant to be deficient in supplying fall protection, in good condition, on site. Tr. 108. He noted that Tarburton shares equipment with two nearby mining operations and rents equipment when sharing is not a viable option. Tr. 110. According to Dailey, he has observed employees appropriately accessing equipment, and he maintained that he has not seen anyone walk on the belt. Tr. 113. In order to grease the head pulleys at issue, Dailey explained, Pennsy's employees are required to "lower that conveyor down to its maintenance position, which is as low as it'll go to the ground, lock that piece of equipment out of service, secure a ladder, whether it's a step ladder that you don't need assistance or an extension ladder where you would, access the ladder up to the head pulley position, secure it if need be, do the greasing of the two pieces inspected, and then put everything

back in service.” Tr. 113. Because many ladders were available throughout the property, he asserted, it was not expected that anyone would walk the belt. Tr. 114. Dailey was adamant that the company was maintaining safe means of access by having safety policies in place and enforcing them and that, based on Pennsy’s investigation, there is no evidence to support Avery’s statement or the Secretary’s charges. Tr. 115-17. He made it clear through his testimony, that, because Avery refused to elaborate on when and how he had walked the belt, and because Pennsy could find no corroboration of his statement, Pennsy disciplined Avery for simply telling the inspector that he had accessed the equipment in the prohibited manner. Tr. 123-24, 128, 136-39, 143, 146. Dailey noted that Avery was not called by Pennsy to testify because he was on pre-approved vacation. Tr. 139; ex. R-10. Finally, Dailey testified that, because several means of fall protection were available at the time of the inspection, he “would have thought that there would have been more inquiries into what is the practice, what is the policy, what equipment is available, let’s look at the equipment and talk to other miners. And none of that was done.” Tr. 141-42.

Dorothy Lehmann, safety director for Tilcon, Delaware, testified that she conducts training at the company’s facilities, including Tarburton. Tr. 150-51. She established that Thomas Avery’s annual refresher training was current, and had included fall protection and safe access dating back, at least, to 2002. Tr. 152-57; ex. R-8. According to Lehmann, during Horn’s pre-inspection paperwork review, he had mentioned safe access in a brief, general discussion with her. Tr. 158-59. She stated that Tarburton has safe access equipment on site and that she had no reason to believe that any employee had been violating Pennsy’s written safety policies. Tr. 160. She asserted that she had never seen a worker walk the belt, and that Avery had never brought any safe access concerns to her attention. Tr. 160-61. As to the inspector’s conversation with Avery, Lehmann testified that she heard Horn ask “Tom how he had greased that head pulley,” but that she could not recall precisely what Avery had answered. Tr. 163, 167, 168-69. When Horn issued the citations, Lehmann stated, she and Hickman complained to him that the narratives misstated that he had observed the alleged violations, but Horn refused to change the wording. Tr. 164. She participated in the investigation by asking other miners and Hickman what procedure they used for greasing the head pulley, and was told “that the conveyor was lowered and locked, and that a ladder was used to access the head pulley, for other servicing that the forklift was used with the man basket.” Tr. 165-66. According to Lehmann, she did not find anyone who had observed Avery walk the belt, and she doubted that he could have done so without being seen. Tr. 176. Lehmann acknowledged that she did not talk to Avery, since it had already been established that he had made the statement to the inspector. Tr. 168. She voiced her objection to the citations on the bases that there was no evidence of the alleged conduct at the site, the inspector had not eye-witnessed prohibited conduct, and the company had been providing a variety of safety equipment. Tr. 173-75.

Richard Hickman, Tarburton’s plant manager, testified that, pursuant to his investigation of Avery’s statement to Horn, Avery “said, yes, but he couldn’t give me a time when he did it.” Tr. 194, 212-14, 216-17. According to Hickman, Avery had worked at Tarburton ten to twelve years and, despite Dailey’s recommendation that Pennsy suspend him for two days, Hickman

issued Avery a written warning for his statement of unsafe conduct, taking into account Avery's lack of a disciplinary record. Tr. 195. Hickman maintained that he had been unaware of the scheduled hearing date at the time that he had pre-approved vacation leave for Avery and that, ultimately, he advised Avery that he would have to appear if MSHA subpoenaed him. Tr. 197-98. Regarding the inspection, Hickman explained that he had not heard the discourse between Horn and Avery. He testified that he had explained to Horn that, to grease the head pulley he would "go get a ladder, put it down on the head pulley, secure it with a rope, come down, get a grease gun and go up there and grease it, and vice versa do the other side." Tr. 201-02. This was the customary manner in which the employees performed the function, he asserted, and miners are task trained on maintenance activities in weekly tailgate meetings. Tr. 202-03, 207-09;

ex. R-12. As for the safety equipment maintained at the mine, Hickman explained that extension ladders were being used on the day of the inspection, and that Tarburton had access to a fork lift with a basket housed at the Bay Road facility five miles away. Tr. 204. Hickman further testified that he had never seen Avery walk the belt and that, of the entire crew, no one had ever reported having seen him do so. Tr. 206, 211-12. He corroborated Lehmann's testimony that they had objected to Horn's misleading narrative on the citations, but that Horn would not change his wording. Tr. 211. Like Lehmann, Hickman expressed disbelief that it was possible to walk a distance of 150 feet on the belt. Tr. 216-18, 220. He also opined that accessing the belt makes no sense, when the ladder provides direct access to the head pulley. Tr. 226-27.

C. Fact of Violation

The Secretary concedes that Pennsy *provided* safe means of access to its working places by referencing Inspector Horn's acknowledgment that ladders and safety belts were on site during his inspection; it is the company's failure to *maintain* a safe means of access, she argues, that is the foundation of the violations. Sec. Br. at 5. In essence, the Secretary is charging Pennsy with failure to *ensure* that Avery used proper safety equipment when he serviced the head pulleys on the C1 and C2 conveyors. Sec. Br. at 7. Penny's own decision to discipline Avery, the Secretary maintains, is evidence that the company, itself, believed that Avery had walked the beltways.

Pennsy contends that it is a safety conscious operation that *provides* and *maintains* safe means of access. The company points to several types of safety equipment that were in view of Inspector Horn, its Employee Safety Manual and Fall Protection Program, and its extensive training of all employees in safe access procedures and use of fall protection. Pennsy asserts that its customary procedure for accessing the C1 and C2 head pulleys is by use of secured ladders, and that there is no evidence of unsafe conduct that would corroborate Avery's statement that he walked the belt. Avery received a written warning for having made the statement to Horn, Pennsy argues, because of the company's overriding responsibility for deterring its miners at all facilities from engaging in unsafe work practices. Tr. 143.

Pennsy, essentially, concedes that Avery walked the beltways by testifying that Avery admitted telling Horn that he had done so. It is clear that Horn was inquiring about current

practice, and I fully credit his testimony that Avery was describing recent conduct. While it is curious that Avery would use a ladder to access the belt, rather than the head pulley directly, I find that he walked the belts to the head pulleys, as reported to Horn. What is lacking, however, is the Secretary's evidence of the circumstances under which he engaged in the prohibited conduct. Horn testified that he asked no follow-up questions of Avery. There are several questions that he could have posed that would have demystified Avery's conduct. For example, Horn could have asked Avery to specify when the activity took place and whether it was frequent or isolated. He could have asked Avery whether he used fall protection, and where he tied off. He could have asked Avery whether he had received training on performing maintenance and accessing equipment safely. Likewise, Horn could have interviewed other employees to ascertain whether they also performed maintenance on the head pulleys, what procedures were used, and whether they had ever seen Avery walking the belts. According to Horn, he did not make inquiries of management about the company's policies and training program on safe means of access.

The evidence establishes that Pennsy enjoys an exemplary safety record, provides several types of equipment for safe access to its machinery, has written policy requiring safe conduct in work performance, and devotes significant time and resources to training its employees on safe work habits. It is also established that Tarburton miners customarily access the head pulleys by use of secured ladders, and that no one has been observed walking the belts to grease them. The Secretary's position suggests that Pennsy is required to constantly monitor its employees in the performance of their duties. I disagree, primarily because its employees are highly trained in the use of safety equipment that is readily available and, among other safeguards, they are required to report unsafe conduct to management. The aberrant behavior of one employee, without evidence indicating that it was frequent, flagrant or condoned by management, falls short of establishing that the company was less vigilant than the standard requires. Interestingly, the Secretary urges me to draw an adverse inference against Pennsy for its failure to call Avery as its witness. I decline to do so, especially in light of the fact that the Secretary made no effort to subpoena Avery or otherwise preserve his testimony. The Secretary also argues that MSHA investigations are routinely conducted in instances where inspectors have not eye-witnessed alleged violative conduct. I agree. That argument fails, however, because it simply does not resurrect the evidence lacking in the Secretary's case. Therefore, I conclude that the Secretary's evidence, which consists of Avery's statement to Horn, fails to support the conclusion that Pennsy did not maintain a safe means of access to the head pulleys on the C1 and C2 conveyors, as alleged.

Because I find that the Secretary has failed to prove, by a preponderance of the evidence, that Pennsy violated 30 C.F.R. § 56.11001, Citation Nos. 6020987 and 6020988 must be vacated.

ORDER

Accordingly, it is **ORDERED** that Citation Nos. 6020987 and 6020988 are **VACATED**, and this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge
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